

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NOTICE OF PROPOSED REVISIONS TO 5TH CIR. R.

Pursuant to 28 U.S.C. § 2071, notice is hereby given that the court is considering adoption of the enclosed changes to 5TH CIR. R. 3, 5, 11, 21, 22, 27, 31, 32, 35, 42 and 46. The proposed rule changes are posted on the Internet at < <http://www.ca5.uscourts.gov> > .

The proposed rule amendments contain several major changes:

5TH CIR. R. 5 and 21 establish page limits for petitions for permission to appeal, and for petitions for mandamus and other extraordinary relief.

5th Cir. R. 22 requires applications for certificates of appealability and motions for permission to file second and successive applications under 28 U.S.C. §§ 2254 and 2255 to meet the format requirements and length limitations found in FED. R. APP. P. 32(a) and 5TH CIR. R. 32.

5TH CIR. R. 27 is rewritten. Most importantly, the rule delegates broader powers to the clerk to act for the court on opposed and unopposed procedural motions, to act on motions to proceed in forma pauperis, to appoint counsel or to allow appointed counsel to withdraw, and to obtain transcripts at government expense. 5TH CIR. R. 27.5 is deleted.

5TH CIR. R. 31.4 is rewritten. The proposed rule allows for only two categories of extension, those not exceeding 30 days, and those over 30 days. Rulings on extension motions generally will be centralized in the clerk's office.

5TH CIR. R. 46.4 is added and provides for practice before the court by law students.

Minor changes are made in 5TH CIR. R. 3, 11.2, 11.3, 27.2, 32.6, 35.2.10 and 42.3.1.1 generally to clarify the previous rules and practices, or to correct typographical errors.

Proposed new language is underlined, language proposed for deletion is stricken through.

You may send written comments on the proposed rule changes to Charles R. Fulbruge III, Clerk, U.S. Court of Appeals, Fifth Circuit, 600 Camp Street, New Orleans, LA 70130, or electronic comments to < Rules_Changes@ca5.uscourts.gov > , no later than August 1, 2000.

Charles R. Fulbruge III
Clerk of Court

June 1, 2000

5TH CIR. R. 3

FILING FEE

Filing Fee. When the notice of appeal is filed, the \$105 fees established by 28 U.S.C. §§ 1913 and 1917 must be paid to the district court clerk. After the Fifth Circuit receives a duplicate copy of a notice of appeal, the clerk will send counsel or a party notice advising of other requirements of the rule. No additional fees are required. Failure to pay the ~~docketing~~ fees does not prevent the appeal from being docketed, but is grounds for dismissal under 5TH CIR. R. 42.

5TH CIR. R. 5

LENGTH OF PETITION

Length. A petition for permission to appeal must not exceed 20 pages, excluding the certificate of interested persons, corporate disclosure statement, proof of service and the accompanying documents required by FED. R. APP. P. 5(b)(1)(E). Any answer to the petition must not exceed 10 pages, not counting the applicable exclusions from the page limit allowed for the petition.

5TH CIR. R. 11

11.2 Requests for Extensions of Time. Court reporters seeking extensions of the time for filing the transcript beyond the 30 day period fixed by FED. R. APP. P. 11(b) must file an extension request with the clerk of this court and must specify in detail:

- (a) The amount of work accomplished on the transcript;
- (b) A list of all outstanding transcripts due to this and other courts, including the due dates for filing; and
- (c) A verification that the trial court judge who tried the case is aware of and approves the extension request.

If a court reporter's request for an extension of time is granted, he or she must promptly notify all counsel or unrepresented parties of the extended filing date and send a copy of the notification to this court.

11.3 Duty of the Clerk. The district court clerk is responsible for determining when the record on appeal is complete for purposes of the appeal. Unless the record on appeal is sent to this court within 15 days from the filing of the notice of appeal or 15 days after the filing of the transcript of any trial proceedings, whichever is later, the district court clerk must advise the clerk of this court of the reasons for delay and request an extension to file the record. The clerk of this court may grant an extension for no more than 45 days. Extensions beyond 45 days are referred to a single judge. When transmitting the record on appeal in a direct criminal appeal involving more than one defendant, the district court must separate and identify the pleadings and any transcripts of pre-trial, sentencing, and post-trial hearings that apply to fewer than all of the

defendants. However, only one copy of the trial transcript is required. In an action involving more than one defendant at trial but where separate actions are filed under 28 U.S.C. § 2255, the district court must separate and identify the pleadings and transcripts of pre-trial, sentencing, and post-trial hearings that apply to less than all of the defendants. One copy of the trial transcript is required for each defendant filing a separate § 2255 action. ~~or in a 28 U.S.C. § 2255 action, involving more than one defendant, the district court must separate and identify the pleadings and transcripts for each defendant.~~

5TH CIR. R. 21

Petition for Writ. The petition must contain a certificate of interested persons as described in 5TH CIR. R. 28.2.1. The petition for writ must not exceed 20 pages, excluding the certificate of interested persons, corporate disclosure statement and the items required by FED. R. APP. P. 21 and 5TH CIR. R. 21. Any answer must not exceed 10 pages, not counting the applicable exclusions from the page limit allowed for the petition.

In addition to the items required by FED. R. APP. P. 21, the application must contain a copy of any memorandum or brief filed in the district court supporting the application to that court for relief and any memoranda or briefs filed in opposition, as well as a transcript of any oral reasons the district judge gave for his or her action.

5TH CIR. R. 22 APPLICATIONS FOR CERTIFICATES OF APPEALABILITY AND MOTIONS FOR PERMISSION TO FILE SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATIONS

Applications for certificates of appealability, motions for permission to file second or successive applications under 28 USC §§ 2254 and 2255, and any responses must conform to the format requirements and the length limitations of FED. R. APP. P. 32(a), and 5TH CIR. R. 32 as applicable.

5TH CIR. R. 27 MOTIONS

27.1 Clerk May Rule on Certain Motions. Under FED. R. APP. P. 27(b), ~~the clerk has discretion to act on,~~ in accordance with the standards set forth in the applicable rules, ~~or to refer to the court, the procedural motions listed below. ~~and subject to review by the court, to grant, deny, or take other appropriate action for the court on the following unopposed procedural motions:~~~~ The clerk's action is subject to review by a single judge upon a motion for reconsideration made within the 14 or 45 day period set by FED. R. APP. P. 40. **All motions must state that the movant has contacted or attempted to contact all other parties and must indicate whether an opposition will be filed.**

27.1.1 To extend the time for: filing answers or replies to pending motions; paying filing fees; filing motions to proceed in forma pauperis; filing petitions for panel rehearing and rehearing

en banc, and for reconsideration of single judge orders, for not longer than 14 days, 30 days if the applicant for extension is a prisoner proceeding pro se; filing briefs as permitted by 5TH CIR. R. 31.4; filing bills of costs; and filing applications under the Equal Access to Justice Act.

27.1.2 To rule on motions to file briefs out of time.

27.1.3 To stay further proceedings in appeals.

27.1.4 To correct briefs or pleadings filed in this court at counsel's request.

27.1.5 To stay the issuance of mandates pending certiorari in civil cases only, for no more than 30 days, provided the court has not ordered the mandate issued earlier.

27.1.6 To reinstate appeals dismissed by the clerk.

27.1.7 To enter and issue consent decrees in labor board and other government agency review cases.

27.1.8 To enter CJA Form 20 orders continuing trial court appointment of counsel on appeal for purposes of compensation.

27.1.9 To consolidate appeals.

27.1.10 To withdraw appearances.

27.1.11 To supplement or correct records.

27.1.12 To incorporate records or briefs on former appeals.

27.1.13 To file reply or supplemental briefs in addition to the single reply brief permitted by FED. R. APP. P. 28(c) prior to submission to the court.

27.1.14 To file an amicus curiae brief under FED. R. APP. P. 29 (see 5TH CIR. R. 29.4).

27.1.15 To enlarge the number of pages of optional contents in record excerpts.

27.1.16 To extend the length limits for: briefs under FED. R. APP. P. 32(a)(7) and 5TH CIR. R. 32; petitions for rehearing en banc and panel rehearing under FED. R. APP. P. 35(b)(2), and 40(b); certificates of appealability and motions for permission to file second or successive habeas corpus applications under 28 USC §§ 2254 and 2255, under 5TH CIR. R. 22; petitions for permission to appeal under 5TH CIR. R. 5; and petitions for mandamus and extraordinary writs under 5TH CIR. R. 21.

27.1.17 To transmit records to the Supreme Court for use in connection with petitions for writs of certiorari.

27.1.18 To proceed in forma pauperis, see FED. R. APP. P. 24 and 28 U.S.C. § 1915;

27.1.19 To appoint counsel or to permit appointed counsel to withdraw;

27.1.20 To obtain transcripts at government expense.

27.2 Single Judge May Rule on Certain Motions. Pursuant to FED. R. APP. P. 27(c), any single judge of this court has discretion, subject to review by a panel upon a motion for reconsideration made within the 14 or 45 day period set forth in FED. R. APP. P. 40, to take appropriate action on the following procedural motions:

27.2.1 ~~Where opposed, the motions in 5TH CIR. R. 27.1, supra. The motions listed in 5TH CIR. R. 27.1 which that have been referred to a single judge for initial action, or for single judge reconsideration of a ruling made by the clerk, but the judge is not limited to the time restrictions in 5TH CIR. R. 27.1.1.~~

27.2.2 To permit interventions in agency proceedings pursuant to FED. R. APP. P. 15(d).

27.2.3 To act on applications for certificates of appealability under FED. R. APP. P. 22(b) and 28 U.S.C. § 2253 except for death penalty cases where a three judge panel must act.

27.2.4 ~~To appeal in forma pauperis, see FED. R. APP. P. 24 and 28 U.S.C. § 1915.~~

27.2.5 ~~To appoint counsel or to permit counsel to withdraw.~~

27.2.6 ~~To extend the length limits for briefs under FED. R. APP. P. 32(a)(7) and 5TH CIR. R. 32, of petitions for rehearing under FED. R. APP. P. 40(b), and petitions for en banc review under FED. R. APP. P. 35(b)(2).~~

27.2.74 To extend for good cause the times prescribed by the Federal Rules of Appellate Procedure or by the rules of this court except for enlarging the time for initiating an appeal, see FED. R. APP. P. 26(b).

27.2.85 To substitute parties under FED. R. APP. P. 43.

27.2.96 To exercise the power granted in FED. R. APP. P. 8 and 9, respecting stays, or injunctions, or releases in criminal cases pending appeal, and subject to the restrictions set out in those rules; and to exercise the power granted in FED. R. APP. P. 18, respecting stays pending review of agency decisions or orders, subject to the restrictions on the power of a single judge contained in that rule.

~~27.2.107~~ To stay the issuance of mandates or to recall same pending certiorari.

~~27.2.118~~ To expedite appeals.

~~27.2.12~~ To extend the time for filing briefs as provided in 5TH CIR. R. 31.4.

~~27.2.139~~ To strike a nonconforming brief or record excerpts as provided in 5TH CIR. R. 32.6 and to strike other papers not conforming to the FED. R. APP. P. and 5TH CIR. R.

27.3 Emergency Motions. Counsel ordinarily should file emergency motions or applications with the clerk rather than with an individual judge. Where time does not permit filing a motion or application in person, by mail, or by fax, counsel may contact the clerk by telephone, and thereafter counsel must file the motion in writing with the clerk as promptly as possible. The motion, application, or contact must contain a brief account of the prior actions of this or any other court or judge to which the motion or application, or a substantially similar or related petition for relief, has been submitted.

27.4 Form of Motions. Parties or counsel must comply with the requirements of FED. R. APP. P. 27 including the length limits of FED. R. APP. P. 27(d)(2). Except for purely procedural matters, motions must include a certificate of interested persons as described in 5TH CIR. R. 28.2.1. Where a single judge or the clerk may act only an original and 1 copy need be filed. All motions requiring panel action require an original and 3 copies.

~~**27.5 Acknowledgment.** Except for procedural motions, the clerk will notify counsel that a motion has been received and filed. This notice will fix the time for filing any response and inform counsel of the approximate date when the motion must be submitted to the court.~~

27.65 Motion To Expedite Appeal. Such motions are presented in the same manner as other motions. Only the court may expedite an appeal and only for good cause. If an appeal is expedited, the clerk will fix a briefing schedule unless a judge directs a specific date. ~~The clerk will usually have an approximate date for the hearing and will so advise counsel when the order is issued.~~

31.4 Briefs - Time for Filing.

31.4.1 General Provisions. The court expects briefs to be filed timely and without extensions in the vast majority of cases. No extensions are automatic, even where the request is unopposed. Any requests for extensions ~~—including initial extensions and extensions that can be granted by the clerk—~~should be made sparingly. No extension can be granted without good cause shown as required by FED. R. APP. P. 26(b), or without meeting the additional requirements contained in the 5TH CIR. R.

- (a) A request for extension should be made as soon as it is reasonably possible to foresee the need for the extension. The clerk must receive a request for extension

at least 7 calendar days before the due date ~~(including Saturdays, Sundays, and holidays as provided in FED. R. APP. P. 26(a))~~, unless the movant demonstrates, in detail, that the facts that form the basis of the motion either did not exist earlier or were not and with due diligence could not have been known earlier.

- (b) ~~Before requesting an extension, the movant must contact all other parties to determine whether the request is opposed. As specified in 5TH CIR. R. 27.1, the movant must indicate that all other parties have been contacted and whether the motion is opposed.~~ Movants should request only as much time as is absolutely needed. The pendency of a motion for extension does not toll the time for compliance.

31.4.2 Grounds for Extensions. As justification for extensions, generalities, such as that the purpose of the motion is not for delay or that counsel is too busy, are not sufficient. Grounds that may merit consideration for extensions are, without limitation, the following, which must be set forth if claimed as a reason in any motion for a ~~Level 2 or Level 3 extension (as defined in 5TH CIR. R. 31.4.3):~~ an extension beyond 30 days:

- (a) Engagement of counsel in other litigation, provided such litigation is identified by caption, number, and court, and there is set forth:
- (1) A description of any effort taken to defer the other litigation and of any ruling thereon;
 - (2) An explanation of why other litigation should receive priority over the case at hand; and
 - (3) Other relevant circumstances, including why other associated counsel cannot prepare the brief or relieve the movant's counsel of the other litigation.
- (b) The matter is so complex that an adequate brief cannot reasonably be prepared when due.
- (c) Extreme hardship will result unless an extension is granted, in which event the nature of the hardship must be set forth in detail.

31.4.3 Levels of Extensions. There are ~~three~~ two levels of extensions: a Level 1 extension of 1-30 days from the original due date; and a Level 2 extension of ~~31-60 days~~ more than 30 days from the original due date; ~~and a Level 3 extension of more than 60 days from the original due date.~~

31.4.3.1 Level 1 Extensions. The clerk is authorized to ~~grant, deny, or take other appropriate action for the court on unopposed~~ act on or refer to the court Level 1 extensions. The court prefers that the an unopposed request be made by telephone, but it may be by written motion

or letter. When making the request, the movant must explain what good cause exists for the extension. If the extension is granted by telephone, the movant shall immediately send a confirming letter to the clerk, with copies to all parties. ~~Instead of acting on the request, the clerk may refer it to the court.~~

~~If the request is An opposed, it request for a Level 1 extension must be made only by written motion setting forth why there is good cause. The motion must state the initial due date, whether any other extension has been granted, the length of the requested extension, and which parties have expressed opposition. Only the court can act on opposed extensions.~~

31.4.3.2 Level 2 Extensions. The clerk is authorized to ~~grant, deny, or take other appropriate action for the court on unopposed~~ act on or refer to the court Level 2 extensions. The request must be made by written motion, with copies to all parties, stating the initial due date, whether any other extension has been granted, the length of the requested extension, and whether the motion is opposed.

~~More than ordinary good cause is required for a Level 2 extension, and Level 2 extensions will be granted only under the most extraordinary of circumstances. The movant must demonstrate diligence and substantial need and must show in detail what special circumstances exist that make a Level 1 extension insufficient. Instead of acting on the motion, the clerk may refer it to the court. Only the court can act on opposed extensions.~~

~~31.4.3.3 Level 3 Extensions. The court must act on Level 3 extensions which are greatly disfavored. They will be granted only under extraordinary circumstances and for the most compelling reasons.~~

~~The motion must state the initial due date, whether any other extension has been granted, the length of the requested extension, and whether the motion is opposed. The motion must disclose facts that establish that with due diligence, and giving priority to the preparation of the brief, it is not reasonably possible to file the brief timely. Facts must be set forth with specificity. In cases in which a party may be in custody, the motion must state the custodial status, including the status of any bail.~~

31.4.4 Extensions for Reply Briefs. The court greatly disfavors all extensions of time for filing reply briefs. The court assumes that the parties have had ample opportunity to present their arguments in their initial briefs and that extensions for reply briefs only delay submission of the case to the court.

5TH CIR. R. 32.6. Rejection of Briefs and Record Excerpts. If all copies of briefs and record excerpts do not conform to 5TH CIR. R. 28 and 30 and all provisions of FED. R. APP. P. 32, the clerk will file the briefs and record excerpts .

5TH CIR. R. 35.2.10. A copy of the opinion or order sought to be reviewed. The opinion or order shall be bound with the ~~suggestion~~ petition and shall not be marked or annotated.

5TH CIR. R. 42.3.1.1. Appeals with Counsel. ... The clerk must refer to the court the matter of disciplinary action against the attorney. The court may refer the matter of disciplinary action to a ~~district or magistrate judge to act as a special master~~ including but not limited to a district or magistrate judge.

5TH CIR. R. 46 ATTORNEY ADMISSION AND LAW STUDENT PRACTICE

46.4 Appearance and Argument by Eligible Law Students

46.4.1 Requirements and Limitations. A law student seeking to practice before this court must:

- (a) Be currently enrolled in an American Bar Association approved law school within the geographic jurisdiction of this court;
- (b) Have completed at least four semesters, or the equivalent if the school is on other than a semester basis;
- (c) Be certified by the law school dean as being of good character and competent legal ability, and as being adequately trained to perform as an eligible law student under this rule;
- (d) Not receive any compensation or remuneration of any kind from the party on whose behalf the law student renders service;
- (e) Certify in writing that he or she has read and is familiar with the FED. R. APP. P., 5TH CIR. R., and the rules of professional conduct governing attorneys practicing in the jurisdiction where the law school is located.

46.4.2 Appearance. A law student who qualifies to practice under 5TH CIR. R. 46.4.1 may appear in this court on behalf of any indigent party, provided the party has consented in writing, a supervising attorney has approved the appearance in writing, and the applicable state law permits law students to appear as counsel in court under the circumstances. The supervising attorney will be attorney of record in the case.

46.4.3 Certification. The law school dean's certification required by 5TH CIR. R. 46.4.1(c), and the written consent and approval required by 5TH CIR. R. 46.4.2 must be filed with the clerk along with the supervising attorney's Notice of Appearance form. The dean may withdraw certification at any time by mailing a notice to the clerk. The notice need not state the reason for withdrawal. This court may terminate a certification at any time without notice or hearing.

46.4.4 Briefs. An eligible law student may prepare briefs and other documents under the general direction of a qualified supervising attorney. The supervising attorney must review and sign any document filed on behalf of the client represented by the law student. The law student's

name, along with the supervising attorney's name, may appear on any document that the student prepared or helped to prepare.

46.4.5 Oral Argument. An eligible law student may participate in oral arguments in this court only with the express unanimous approval of the panel. During oral argument, the supervising lawyer must be present and prepared to supplement or correct any written or oral statement made by the student.

46.4.6 Supervision. A supervising attorney must:

- (a) Be a lawyer in good standing of the bar of this court and of the state bar of the state in which the law school is located; and
- (b) Assume personal professional responsibility for the student's work.

SPECIAL NOTICE OF APPEARANCE

Supervising Attorney and Law Student

Title of Action _____

Case Docket No. _____

Please be advised that [name of supervising attorney] appears as attorney for [name of client] and is acting as supervising attorney for [name of law student], a law student who satisfies the requirements for student practice under 5TH CIR. R. 46.4.

The supervising attorney and the law student have read and agree to abide by 5TH CIR. R. 46.4 governing student practice.